

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW)
RULES I through III and amendment of)
ARM 12.11.6601, 12.11.6603, and) NOTICE OF ADOPTION AND
12.11.6605 regarding emergency) AMENDMENT
closures of department lands and)
public waters)

TO: All Concerned Persons

1. On July 30, 2009, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-356 pertaining to the proposed amendment and adoption of the above-stated rules at pages 1208 of the 2009 Montana Administrative Register, Issue Number 14.

2. The commission has amended ARM 12.11.6603 and 12.11.6605 and adopted New Rules II (ARM 12.8.218) and III (ARM 12.8.219) as proposed.

3. The commission has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

12.11.6601 DEPARTMENT'S AUTHORITY TO CLOSE PUBLIC WATERS DUE TO EMERGENCY (1) The commission authorizes the department to adopt temporary emergency rules to close public waters or portions thereof to public use as provided in ARM 12.11.6603.

(2) and (3) remain as proposed.

AUTH: 87-1-303, MCA

IMP: 2-4-303, 87-1-303, MCA

4. The commission has adopted the following rule as proposed but with changes from the original proposal, matter to be stricken interlined, new matter underlined.

NEW RULE I (ARM 12.8.217) DEPARTMENT'S AUTHORITY TO CLOSE DESIGNATED RECREATION AREAS DUE TO EMERGENCY (1) The commission authorizes the department to adopt temporary emergency rules to close designated recreation areas or portions thereof to public use as provided in NEW RULE II.

(2) and (3) remain as proposed.

AUTH: 23-1-106, 87-1-303, MCA

IMP: 2-4-303, 23-1-106, 87-1-303, MCA

5. The following comments were received and appear with the commission's responses:

Comment 1: One person commented to the commission that they did not believe the commission or the department have or should have the power to regulate any of the closures of the waters or parks.

Response 1: The commission does have the statutory authority provided in 87-1-303, MCA to "adopt and enforce rules governing uses of lands that are acquired or held under easement by the commission or lands that it operates under agreement with or in conjunction with a federal or state agency or private owner" and "adopt and enforce rules governing recreational uses of all public fishing reservoirs, public lakes, rivers, and streams that are legally accessible to the public or on reservoirs and lakes that it operates under agreement with or in conjunction with a federal or state agency or private owner" and may do so "in the interest of public health, public safety, public welfare, and protection of property and public resources". The department has the statutory authority provided in 23-1-106, MCA to "make rules governing the use, occupancy, and protection of the lands and property under its control". Through this rulemaking process, the commission is delegating its authority to the department to adopt temporary emergency rules closing public waters and designated recreation areas.

The Montana Administrative Procedure Act makes clear that an emergency rule must be used only in extraordinary circumstances. Section 2-4-303(1)(a) states, "if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days notice and states in writing its reasons for that finding, it may proceed upon special notice filed with the committee, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule."

Comment 2: The commission received two comments stating the government did not need to dictate to and regulate the public on public lands and waters. The comments stated the public can be responsible for its own safety and did not need help from the government.

Response 2: The commission recognizes the concerns expressed in these comments. Historically, the commission and department have thoroughly evaluated a situation and other potential options before adopting emergency rules restricting access, recreation, and occupation of public lands and waters. When making these decisions, the safety of the public is evaluated as well as the safety of other individuals such as aircrews fighting fires, search and rescue personnel, and emergency responders. The commission and department have adopted closure rules in order to prevent dangers unknown or unseen to the public creating an emergency situation or done at the request of other agencies involved.

Comment 3: The Administrator of the Parks Division of the Department of Fish, Wildlife and Parks stated the new rules were unclear about the need to specify a

portion of a designated recreation area that can be closed and asked for the ability for the department to close portions of, and specific facilities within, designated recreation areas.

Response 3: The commission has added the language "or portions thereof" to NEW RULE I (ARM 12.8.217) and ARM 12.11.6601 to clarify that a portion of a designated recreation area or water body may be closed.

Comment 4: The Administrator of the Parks Division of the Department of Fish, Wildlife and Parks stated ARM 12.8.209 currently states that "[n]o person may enter any portion of any area that is posted as restricted to public passage" and no criteria are established in association with that authority. The Administrator of the Parks Division asked for clarification of how ARM 12.8.209 relates to the proposed rules.

Response 4: The rules do not relate to each other and do not conflict with each other. ARM 12.5.209 states individuals are not to violate a closure including an emergency closure, seasonal closure, or time restriction such as nighttime closure. These rules effectively delegate authority.

Comment 5: The Administrator of the Parks Division of the Department of Fish, Wildlife and Parks stated that other reasons than the "dangerous conditions" leading to "imminent peril" as stated in NEW RULE II (ARM 12.8.218) and ARM 12.11.6603 can occur that would cause closure. The Administrator of Parks provided an example of investigating a crime and recovering evidence.

Response 5: The commission originally adopted rules delegating its authority to the department to close public waters due to fire emergency. The commission is revising and adopting rules to delegate its authority to the department to close public waters and designated recreation areas due to other emergency situations. The commission and the department will continue to evaluate the need for revisions in the future as other situations occur. As for the example provided by the Administrator of the Parks Division, other statutes and rules apply to the specific situation and are the jurisdiction of local law enforcement and not of the commission or department.

Comment 6: The Administrator of the Parks Division of the Department of Fish, Wildlife and Parks stated, notification prior to the closure is difficult because the first action is to close the site as a means of protecting safety and welfare and communication comes following that action in many cases.

Response 6: The commission understands the urgency to have restrictions enforceable during an emergency situation and for this reason, is delegating its authority to the department. When a rule becomes effective is regulated by statute. Mont. Code Ann. 2-4-306(4)(b)(i) states that a temporary rule is effective immediately upon filing with the secretary of state.

Comment 7: The Administrator of the Parks Division of the Department of Fish, Wildlife and Parks stated the rules were unclear whether the authority could be delegated to staff at any level.

Response 7: The commission has delegated its authority to close designated recreation areas and public waters. The commission does not have authority to delegate responsibilities of department staff. The Director of the Department of Fish, Wildlife and Parks is responsible for establishing and enforcing department protocol.

Comment 8: The Administrator of the Parks Division of the Department of Fish, Wildlife and Parks stated the rules were unclear whether the authority to close a designated recreation area is separate from the authority to close a public water body and hoped the rules would not establish different processes or requirements closing an area where both land and water would be necessary.

Response 8: The commission carefully wrote the rules to mirror processes and requirements for each type of closure. If it becomes necessary to close both land and water, the closure would be adopted as a single temporary emergency rule.

Comment 9: Fishing Outfitters Association of Montana (FOAM) stated concerns regarding closures being based solely on subjective decisions and asked the department to develop internal criteria for department personnel to apply when considering a temporary emergency closure.

Response 9: The commission understands the concerns expressed by FOAM. If any member of the public does not agree with a temporary emergency rule, they are provided with an opportunity to express concerns and comment on the rule. The rule will still be in effect but will be evaluated immediately upon receipt of comment. If a comment is received that justifies amending or repealing a temporary emergency rule, the department will take immediate and appropriate action. The commission will be notified prior to or simultaneously with adoption of the emergency rule. If the commission does not agree with the emergency rule, it will take appropriate action to correct the rule. The commission believes this process will prevent subjective decisions being made.

Comment 10: FOAM stated that it believed the commission is delegating its authority to the department only when a quorum of commissioners cannot be formed and action taken in short order and that individual commissioners would be allowed to authorize, bar, overturn, or repeal adoption of temporary emergency closures in their regions.

Response 10: The commission is delegating its authority to the department because adoption of temporary emergency rules are necessary to respond immediately to a situation that poses a threat to the public health, safety, and welfare. It is not the commission's intention for the department to take the time to contact the members of the commission and to evaluate, and decide whether a quorum can be established. It is the intent of the commission to allow the department to take immediate action

and to notify the commission of that action. An individual commissioner cannot act and make decisions on behalf of the whole commission. However, the commission will be notified prior to or simultaneously with adoption of the emergency rule and the commission may exercise its authority and a quorum can amend or repeal an emergency rule.

Comment 11: FOAM requested the commission and department restrict closures to the section containing the hazards or dangerous conditions that jeopardize public health, safety, and welfare rather than closing entire water bodies.

Response 11: The commission has added the language "or portions thereof" to NEW RULE I (ARM 12.8.217) and ARM 12.11.6601 to clarify that a portion of a designated recreation area or water body may be closed allowing for a closure to be as narrow as possible so the public may continue to access and enjoy the resources.

6. These rule amendments and adoptions are effective November 13, 2009.

/s/ Shane Colton
Shane Colton, Chairman
Fish, Wildlife and Parks Commission

/s/ William A. Schenk
William A. Schenk
Rule Reviewer

Certified to the Secretary of State November 2, 2009.